Office-Supreme Court, U.S.
FILED
JUL 16 1981
ALEXANDER L. STEVAS,
CLERK

81-87

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PAUL EDWARD MOELLER,
Petitioner,

V.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI—CRIMINAL CASE

PHILIP LOUIS RUPPERT
7718 N. Main Street
Suite I
Jonesboro, Georgia 30236
Attorney for Petitioner
404-478-5151

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PAUL EDWARD MOELLER,
Petitioner,

V.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI—CRIMINAL CASE

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit on May 8, 1981, and Petition For Rehearing denied on June 8, 1981.

QUESTIONS PRESENTED

Did the District Court err in holding that the Defendant's statement, "Well, I'm not sure. Exactly what do you want to do?", and the Defendant's act of subsequently following the DEA agent to a room, constitute a know-

ing, intelligent and voluntary waiver of his Fourth Amendment rights or should his statement and subsequent act be classified as a submission to APPARENT lawful authority? *Higgins v. U.S.*, 209 F.2d 819; *U.S. v. Jones*, 475 F.2d 723.

Can a consent to search ever be implied either by silence or by tacit non-resistance, or must a consent to search by specific, affirmative, and clear? *Judd v. U.S.*, 190 F.2d 699.

When apprehension and undue embarrassment abound, in light of the totality of the circumstances, thus inducing psychological coercion is voluntary consent so readily to be found? *Phelper v. Decker*, 401 F.2d 232.

Should police activity be measured by the impact it will have on a good law abiding citizen in the background of an airport terminal in finding voluntary consent? See *U.S. v. Pulvano*, 629 F.2d at 115 footnote one (1).

Was it error to fail to advise the suspect of his Fourth Amendment right to refuse consent given the panoply of the situation? *Schnekloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854.

Should mere acquiescence to APPARENT lawful authority be construed as a waiver of Fourth Amendment rights? *Dunaway v. New York*, 442 U.S. 200 (1979).

Should more credibility be afforded the testimony of an experienced agent of the government, who is trained in police investigation tactics, over that of a mere citizen?

Does probable cause exist under the auspices of *U.S. v. Mendenhall* when any one of the criteria is met under the drug courier profile or must a given quantum of the criteria setforth therein be met in order to establish probable

cause to detain and or search a citizen passing through an airport?

Was it error to hold that the making of a phone call of at least ten minutes in duration and the lack of possession of any visable baggage claim ticket constituted enough primia facia evidence to establish a reasonable suspicion to conclude that criminal activity was afoot or should it be more properly characterized as the kind of behavior that could reasonably be expected of anyone changing planes at an airport? *Reid v. Georgia*, ___ U.S. ___, 65 L.Ed.2d at 894(3), 100 S.Ct. ___.

When a citizen relinquishes his driver's license and airline ticket or any other such items at the request of a government agent without any awareness as to the length or affects of this relinquishment, has he not at that time been seized and therefore entitled to full constitutional protection? *U.S. v. Mendenhall*, ___ U.S. ___, 100 S.Ct ___, 64 L.Ed.2d 497.

Given the situation of having "hundreds" of people present at an airline boarding gate, has psychological coercion been used to obtain consent to search when confronted by one who identifies himself as a government agent and does it not therefore constitute a seizure and is one thereafter entitled to the guarantees of the U.S. Constitution?

INDEX

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iv
Table of Authority	iv
Opinion Below	1
Jurisdiction	2
Constitution Provisions Involved	3
Statute	1
Statement of the Case	2
Reasons For Granting the Writ	3
Certificate of Service	11
Appendix A	1a
Appendix B	1b
Appendix C	1c
Appendix D	1d

TABLE OF AUTHORITY

Amos v. United States, 225 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654	4
Brown v. Texas, 443 U.S. 47	9
Bumper v. North Carolina, 391 U.S. 543, 548-550, 88 S.Ct. 1788, 1792, 20 L.Ed.2d. 797 (1968)	10
Davis v. Mississippi, 349 U.S. 721 (1969)	9
Delaware v. Provse, 440 U.S. 648	9

TABLE OF AUTHORITY (Continued)

Page

Dunaway v. New York, 442 U.S. 200 (1979) 8

Herter v. United States, 9 Cir., 27 F.2d. 521 5

Higgins v. United States, 209 F.2d 819 ..... 5, 8

Johnson v. United States, 333 U.S. at 13, 68 S.Ct. at 368 8

Judd v. United States, 190 F.2d 649 ..... 4, 5, 8

Karwicki v. United States, 4th Cir., 55 F.2d 225, 226 4

Kovach v. United States, 6th Cir., 53 F.2d 639 4

Michigan v. Mosely, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1976) 5

Phelper v. Decker, 401 F.2d 232 10

Ray v. United States, 5th Cir., 84 F.2d 654, 656 ..... 5, 7

Reid v. Georgia, ___ U.S. ___, 65 L.Ed.2d at 894(3), 100 S.Ct. ___ ..... iii, 10

Rosenthall v. Henderson, (CA 6th 1966) 389 F.2d 514 . 6

Schnekloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 7

Terry v. Ohio, 392 U.S. 1, 16-19 (1968) 8, 9

United States v. Brignoni-Ponce, 422 U.S. 873, 878 9

United States v. Como, 340 F.2d 891 (2nd Cir., 1965) 5, 8, 10

United States v. Herbst, 641 F.2d 1164 (1981) 5th Cir. 7, 9

United States v. Jones, 475 F.2d 723 ..... 6, 10

United States v. Kelch, D.C. S.D. Ill. 1921, 272 F 484 4

TABLE OF AUTHORITY (Continued)

Page

United States v. McCunn, D.C. S.D. N.Y. 1930, 40 F.2d 295 4

United States v. Mendenhall, ____ U.S. at ____, 100, S.Ct. 1877, 64 L.Ed.2d 509 ..... iii, 8, 9

United States v. Mitchell, 322 U.S. 65, 64 S.Ct. 896, 88 L.Ed. 1140 5

United States v. Nikrosch (CA 7th 1966) 367 F.2d 740 6

United States v. Novero, D.C. S.D. N.Y. 1930, 40 F.2d 295 4

United States v. Pulvano, 629 F.2d at 1155 footnote one (1) 5, 7

CONSTITUTIONAL PROVISIONS

United States Constitution:
Fourth Amendment ..... *passim*

STATUTE

21 U.S.C. § 841(a)(1) 1, 2

OPINION BELOW

The opinion of the United States Court of Appeals For the Fifth Circuit, Case No. 80-7797, and the Petition For Rehearing which was denied on June 8, 1981, are both printed in Appendix A and B.

JURISDICTION

The decision of the United States Court of Appeals For the Fifth Circuit was entered on May 8, 1981. Timely application for Petition For Rehearing was filed on May 21, 1981 and subsequently denied on June 8, 1981.

Federal jurisdiction of the Court of first instance is invoked under 21 U.S.C. § 841(a)(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTE

21 U.S.C. § 841(a)(1)

§ 841 prohibited acts A-Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispose, a controlled substance;

STATEMENT OF THE CASE

On May 8, 1980, at approximately 8:55 A.M., special agent Terry Mathewson of the Drug Enforcement Administration was on duty at the Atlanta Airport observing passengers at Gate 67, Delta Concourse F, which was the arrival gate of Delta Flight 412, a non-stop flight from West Palm Beach, Florida. Agent Mathewson observed the Petitioner, Paul Edward Moeller, deplane. Believing that Petitioner met the criteria for the drug courier profile, Agent Mathewson subsequently confronted Petitioner among "hundreds" of people in the gate seating area. (See footnote four of Magistrate's report in Appendix C.) Agent Mathewson requested Petitioner consent to a search of his person and tote-bag. Petitioner accompanied Agent Mathewson to a Delta office whereupon a search ensued and Petitioner was charged with possession of cocaine with intent to distribute, a Schedule II Controlled Substance in violation of 21 U.S.C. § 841(a)(1), which is the basis of Federal Court jurisdiction.

Petitioner was taken before a United States Magistrate, a copy of the Magistrate's report is set forth in Appendix C.

At sentencing, September 29, 1980, Petitioner received a sentence of five (5) years and a $10,000.00 fine followed by three (3) years mandatory parole.

Prior to trial, Petitioner filed a Motion to Suppress Illegally Obtained Evidence and Fruits Thereof pursuant to Rule 41(f) of the Federal Rules of Criminal Procedure, Title 18, U.S.C. § 2236, and also under the Fourth, Fifth and Sixth Amendments to the Constitution of the United States, and a memorandum of points and authorities in support of the Motion to Suppress Evidence. An Eviden-

tiary Hearing was held June 16, 1980—motion denied July 24, 1980.

On September 2, 1980, trial was held and Petitioner was found guilty as charged. Petitioner appealed and filed briefs on January 26, 1981 after receiving an extension of time on December 3, 1980.

On May 8, 1981, The Fifth Circuit sustained the District Courts ruling and Petitioner timely filed a Motion For Rehearing which was denied on June 8, 1981. (See Appendix A and B.)

On June 12, 1981, Petitioner filed his Motion For Stay of Mandate which was granted on June 22, 1981. (See Appendix D.)

REASONS FOR GRANTING THE WRIT

I. The decision below is inconsistent with decisions of this Court and various Circuit Courts and is therefore incorrect.

A. The writ should be granted since the Petitioner did not make a knowing, intelligent, and voluntary waiver of his Fourth Amendment rights by the statement, "Well, I'm not sure. Exactly what do you want to do?" and his subsequent act of following the DEA agent to a room as erroneously held by the District Court but such should be classified as no more than mere submission to APPARENT lawful authority.

One must look at the totality of the circumstances in deciding whether Petitioner made an intelligent and intentional waiver of his Fourth Amendment rights. As is amply supported by case citition below, it is unreasonable to assume that Petitioner consented to a search of his person and bag. Looking at the moments of the initial

confrontation, Petitioner expressed concern for missing his flight which was to depart in approximately thirty (30) minutes and the "hundreds" present (reference Magistrate's report, Appendix C page three (3), footnote four) had not yet started to board. It is, therefore, only reasonable to conclude that Petitioner did not consent as he so testified and any act of accompanying Agent Mathewson was in mere submission to APPARENT lawful authority since Agent Mathewson had possession of Petitioner's driver's license and airline ticket and he was not free to leave.

The Court in *Judd v. U.S.*, 190 F.2d 649, has held that "the government must show a consent that is unequivocal and specific, freely and intelligently given and the burden of the government is particularly heavy." The Court went on to state "Before a Court holds a Defendant to have waived his protection under the Fourth Amendment, there must be convincing evidence to that effect." But such a waiver or consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied. *Amos v. U.S.*, 225 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654; *U.S. v. Kelch*, D.C. S.D. Ill. 1921, 272 F 484. The government must show consent that is "unequivocal and specific." *Karwicki v. U.S.*, 4th Cir., 55 F.2d 225, 226, "freely and intelligently given." *Kovach v. U.S.*, 6th Cir., 53 F.2d 639. Non resistance to the orders or suggestions of the police is not infrequent in such a situation; true consent, free of fear or pressure, is not so readily to be found. *United States v. Novero*, D.C., 58 F.Supp. 275; *United States v. McCunn*, D.C. S.D. N.Y. 1930, 40 F.2d 295. In fact, the circumstances of the Defendant's plight may be such as to make any claim of actual consent "not in accordance with

human experience", and explainable only on the basis of "physical or moral compulsion." *Ray v. United States*, 5th Cir., 84 F.2d 654, 656. "The line between an accused's voluntary consent and his involuntary submission to police authority is often difficult to draw." *United States v. Como*, 340 F.2d 891 (2nd Cir., 1965). The protection of the Fourth Amendment extends to all equally—to those justly suspected or accused, as well as to the innocent. *Ray v. United States*, 84 F.2d at 656. In *Higgins v. United States*, 209 F.2d at 820, it is stated "if a valid confession precedes a search by police, permission may show true consent to the search". *United States v. Mitchell*, 322 U.S. 65, 645 Ct. 896, 88 L.Ed. 1140. "But no sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered. It follows that when police identify themselves as such, search a room, and find contraband in it, the occupant's words or signs of acquiescense in the search, accompanied by denial of guilt, do not show consent; at least in the absence of some extraordinary circumstance, such as ignorance that contraband is present. No such circumstance is shown here."

B. Consent to search must be specific, affirmative and clear and should not be implied either by silence or tacit non-resistance.

The District of Columbia circuit in *Judd v. United States*, 190 F.2d at 651 citing *Herter v. United States*, 9th Cir., 27 F.2d 521 stated, "a finding of consent in such circumstances has been held to be "unfounded in reason." See also: *United States v. Pulvano*, citing *Michigan v. Mosely*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1976), "where it appears that the DEA agents went to great lengths to ensure that Appellant's rights were protected

and that, if he did give his consent, it was done voluntarily."

C. A consent to search cannot be lightly inferred, and the government must establish by clear and convincing evidence that the consent was voluntarily given and was not coerced, either physically or psychologically. *United States v. Jones*, 475 F.2d at 728.

If we assume consent was given, Petitioner argues that he was psychologically coerced into giving his consent due to inordinate intimidation by legal authority, as is amply supported by the Fifth's Circuit opinion of the above-styled case dated May 8, 1981. Twice while still in the gate area, Agent Mathewson identified himself as a police officer among "hundreds" of people seated around Petitioner. (Reference Magistrate's report Appendix C, Page 3, footnote 4). This ultimately caused apprehension and embarrassment to Petitioner. Based upon the totality of the circumstances, Petitioner argues that the District Court's findings are clearly erroneous.

D. Before a Court holds a Defendant to have waived his protection under the Fourth Amendment, there must be convincing evidence to that effect and the fact as to whether or not Petitioner was made aware of his right to refuse consent should properly be considered in determining any waiver.

The difficulty in determining whether consent was voluntarily given, and the recognition that many persons accused of crime are ignorant of their rights, had led some Courts to require as a prerequisite to effective consent, that the suspect be apprised of his right to refuse consent. See: *United States v. Nikrosch* (CA 7th 1966) 367 F.2d 746; *Rosenthall v. Henderson* (CA 6th 1968) 389 F.2d 514. Other Courts however, have continued to follow the vein that a

failure to warn the suspect is merely one factor to be considered in determining whether, under all the circumstances of the particular case, consent to search was voluntary. The Supreme Court apparently settled this question in *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854, holding that "the questions of voluntariness is to be determined from the totality of the circumstances."

Lack of consent is evidenced by the fact that Petitioner was never apprised of his Miranda warnings by Agent Mathewson, the same Agent Mathewson who in *United States v. Pulvano*, had advised Pulvano of his rights to refuse to allow the search of his person and his suitcase and subsequently advised *Pulvano* of his Miranda warnings. Again in *United States v. Herbst*, 641 F.2d 1164 (1981), Fifth Circuit, Agent Mathewson read Griffin and McGowan their rights concerning the search. Petitioner, unlike Griffin and McGowan, at no time used a false name, in fact he gave his true identity when so requested. Whereas Griffin and McGowan lied about their identity thereby supplying the agent with a reasonable suspicion that they were engaged in criminal activity and thereby justifying a *Terry*-type detention. See also: *United States v. Pulvano* citing *Michigan v. Mosely*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1976), "where it appears that the DEA agents went to great lengths to ensure that Appellant's rights were protected and that, if he did give his consent, it was done voluntarily." The protection of the Fourth Amendment extends to all equally—to those justly suspected or accused, as well as to the innocent. *Ray v. United States*, 84 F.2d at 656 (1936).

E. Mere acquiescence to lawful authority should not be construed as a waiver of Petitioner's Fourth Amendment

rights. *Dunaway v. New York*, 442 U.S. 200 (1979).

In *United States v. Mendenhall*, citing *Dunaway v. New York*, 442 U.S. 200, wherein this Court stated, "Consent cannot be presumed from a showing of acquiescence to authority." The 2nd circuit held in *United States v. Como*, 340 F.2d 891, that "the line between an accused's voluntary consent and his involuntary submission to police authority is often difficult to draw."

The Fifth Circuit in *Higgins v. United States*, 209 F.2d 819, cited an excerpt of this Courts opinion of *Johnson v. United States*, 333 U.S. at 13, 68 S.Ct. at 368, wherein this Court said, "Entry to Defendant's living quarters, which was the beginning of the search was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a Constitutional right." Likewise, the District of Columbia Circuit in *Judd v. United States*, 190 F.2d at 651 said: "Non-resistance to the orders or suggestions of the police is not infrequent. . . ." True consent, free of fear or pressure, is not so readily to be found."

F. A citizen has been seized and is therefore entitled to Fourth Amendment protection when he relinquishes his driver's license and airline ticket without any awareness as to the length or affects of such relinquishment, or any other such items at the request or suggestions of APPARENT lawful authority.

In *United States v. Mendenhall*, ___ U.S. at ___, 100 S. Ct. at 1877, 64 L.Ed.2d at 509, Mr. Justice Stewart, joined by Mr. Justice Rehnquist concluded "a person has been "seized" within the meaning of the Fourth Amendment only if in view of all of the circumstances surrounding the incident, a reasonable person would have believed

that he was not free to leave." The Justice further stated that "the Fourth Amendment's requirement that searches and seizures governs all seizures of the person, 'including seizures that involve only a brief detention short of traditional arrest. *Davis v. Mississippi*, 349 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1, 16-19 (1968).'" *United States v. Brignoni-Ponce*, 422 U.S. 873, 878.

In a similar case, the Fifth Circuit in construing when a seizure occurred stated: "while we agree with *Herbst* that seizure occurred when Agent Markonii asked *Herbst* to accompany him to the Delta office. . . ."

Petitioner argues that he was seized at the moment Agent Mathewson asked him to accompany him to the Delta office. Moreover, the evidence clearly shows that Special Agent Mathewson removed Petitioner's identification and airline ticket from his person and thereafter maintained possession and control over said items. There can be no doubt that at this point, Petitioner was seized within the meaning of the Fourth Amendment as he believed he was no longer free to leave. (*United States v. Mendenhall*) It has been recognized that although in some circumstances a person may be detained briefly without probable cause to arrest, any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity. *Brown v. Texas*, 443 U.S. 47; *Delaware v. Prouse*, 440 U.S. 648.

Petitioner argues that he was entitled to full constitutional protection.

G. Given the situation of having "hundreds" of people present at an airline boarding gate, psychological coercion is present when a citizen is confronted by one who identi-

fies himself as a government agent whose purpose is to obtain the citizen's voluntary consent to be searched. Any consent so obtained is invalid and any submission to the APPARENT lawful authority constitutes a seizure and the citizen is therefore entitled to the guarantees of the United States Constitution.

In *United States v. Jones*, 475 F.2d at 728(3), it is stated "the line between an accused's voluntary consent and his involuntary submission to police authority is often difficult to draw." *United States v. Como*, 340 F.2d 891 (2nd Cir., 1965). And, "when a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, *in fact*, freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548-550, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797 (1968). Consent to search cannot be lightly inferred; the government must establish by clear and convincing evidence that the consent was voluntarily given and was not coerced, either physically or psychologically. *Phelper v. Decker*, 401 F.2d (5th Cir., 1968).

The making of a phone call of at least ten minutes in duration and the lack of possession of any visable baggage claim ticket does not constitute enough primia facia evidence to establish a reasonable suspicion to conclude that criminal activity is afoot. It is, however, the kind of behavior that could reasonable be expected of anyone changing planes at an airport. *Reid v. Georgia*, ____ U.S. ____, 65 L.Ed.2d at 894(3), 100 S.Ct. ____.

CERTIFICATE OF SERVICE

I, PHILIP LOUIS RUPPERT, certify that I duly mailed copies of the foregoing Petition For A Writ of Certiorari, postage prepaid, to MR. WILLIAM SUTTON, Assistant United States Attorney, 1690 Richard B. Russell Building, 75 Spring Street, S.W., Atlanta, Georgia.

This 15th day of July, 1981.

/s/ PHILIP LOUIS RUPPERT
PHILIP LOUIS RUPPERT

APPENDICES

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Paul Edward MOELLER,
Defendant-Appellant.

No. 80-7797

Summary Calendar.

United States Court of Appeals,

Fifth Circuit.
Unit B

May 8, 1981.

Defendant was convicted in the United States District Court for the Northern District of Georgia, at Atlanta, Orinda D. Evans, J., of possession of cocaine hydrochloride with intent to disbribute, and he appealed. The Court of Appeals, Frank M. Johnson Jr., Circuit Judge, held that: (1) initial stop was valid; (2) record amply supported district court's conclusion that defendant voluntarily consented to be searched; and (3) once defendant voluntarily produced vial containing controlled substance, federal agent had probable cause to arrest defendant and any search incident to that arrest was valid.

Affirmed.

1. Arrest 63.5(5)

Initial stop of defendant was not illegal, where defendant was not, at that point, restricted in any way, and was free to talk with federal agent or, if he wished, to walk away, so that neither probable cause nor reasonable

suspicion was required to justify stop. U.S.C.A.Const. Amend. 4.

2. Arrest 63.5(1)

So long as citizen is not restrained in any way or so long as his or her cooperation is not obtained by coercion, force, or other use of authority, mere police-citizen contact is generally not within protections of Fourth Amendment. U.S.C.A.Const. Amend. 4.

3. Searches and Seizures 7(27)

District court's conclusion that defendant voluntarily consented to be searched was amply supported by record which revealed that defendant, without undue or illega compulsion on part of federal agent, agreed to accompany agent to airline's office for pat-down search.

4. Arrest 63.4(16), 71.1(3)

Drugs and Narcotics 184

Defendant's voluntary production of vial containing controlled substance gave rise to probable cause to search defendant's body and his tote bag, and probable cause to arrest defendant for possession of controlled substance; once probable cause to arrest was established, any search of defendant's person incident to arrest was valid.

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY, FRANK M. JOHNSON, Jr., and HENDERSON, Circuit Judges.

FRANK M. JOHNSON, Jr., Circuit Judge:

Defendant Moeller was convicted of possession of cocaine hydrochloride with intent to distribute in violation of 21 U.S.C. § 841(a)(1). He appeals, urging that the trial court erred by denying his motion to suppress evidence of the cocaine seized at the time of the arrest. Finding no Fourth Amendment violation, we affirm.

The facts are undisputed. At approximately 8:55 a. m. on May 8, 1980, Drug Enforcement Administration Agent Mathewson observed the deplaning of an incoming commercial airline flight at the Atlanta airport. The flight was from West Palm Beach, Florida, which Agent Mathewson knew to be a primary distribution point for cocaine. Agent Mathewson noticed among the deplaning passengers defendant, who was later identified as Paul Moeller. Carrying a small totebag, defendant deplaned and walked toward an airline information agent stationed in the arrival area. He removed an airline ticket envelope from his pocket and asked the information attendant for directions to his connecting flight to Indianapolis, Indiana. The attendant directed defendant to gate 59. At this time, Agent Mathewson, who was standing near the attendant, noticed that defendant's ticket was a cash ticket and no baggage claim check stubs were attached to it. Agent Mathewson decided to keep defendant under surveillance as he proceeded to gate 59.

On his way to gate 59 defendant stopped in a restroom, thus allowing Mathewson to reach the gate first. Mathewson spoke with the airline ticket agent at gate 59, giving him defendant's description and asking him to set defendant's ticket aside after defendant surrendered it for the flight. Mathewson then walked in the direction in which he had last seen defendant. He spotted defendant using a pay telephone. Defendant completed his call and pro-

ceeded to gate 59 where he checked in with the airline attendant and sat down in the waiting area. Agent Mathewson then inspected defendant's surrendered ticket coupon and learned that the ticket was issued in the name of Paul Moeller for one-way travel between West Palm Beach and Indianapolis via Atlanta. The ticket had been purchased in cash and bore no claim check stubs for additional luggage. Mathewson left the ticket with the attendant and went to a nearby airline reservation computer to check the reservation history for Paul Moeller. The computer check verified the information on the ticket and additionally indicated that the reservation had been made about three hours prior to departure and that no local telephone contact for West Palm Beach had been given when the reservation was made. From his experience in enforcing drug laws, Agent Mathewson knew that drug couriers often purchase their tickets in cash only hours before departure and often do not provide a local telephone contact.

After checking the reservation history, Agent Mathewson returned to gate 59, approached defendant, told defendant he was a police officer, and asked defendant to speak with him. Because the waiting area was croweded, Mathewson asked if defendant would mind stepping out of the gate area to speak with him. Without responding verbally, defendant walked with Mathewson approximately twenty to thirty feet to a railing that separated the waiting area from the adjacent concourse. Mathewson again identified himself as a police officer by displaying his credentials and asked if defendant would consent to speak with him for a few minutes. Without objecting or questioning the agent's authority, defendant agreed. When asked about his ticket, defendant handed it to Mathewson. Mathewson asked defendant for his name

and defendant replied "Paul Moeller." Mathewson asked for identification and defendant produced a driver's license issued to Paul Moeller. At this time, Mathewson noticed that defendant's breathing was becoming more rapid and his hands were trembling. Mathewson examined the license briefly. In response to a question, defendant told Mathewson that he had been visiting relatives in West Palm Beach for about a week. Mathewson advised defendant that he was a federal narcotics agent looking for drugs passing through the airport and asked if defendant would cooperate by allowing a search to be conducted of his person and totebag. Defendant asserted that he was carrying no drugs and stated that he was "not sure" about the search. Mathewson explained that he only wanted to pat defendant down and look in his totebag. Defendant agreed. Following DEA procedure, Mathewson asked if defendant would prefer to have the search conducted at their present location or in a more private area. Defendant, after being assured that he would not miss his flight if no drugs were found, stated that he would prefer to move to a more private area. They then proceeded to a Delta airline office.

As they entered the Delta office, defendant placed his bag on a table, pulled a prescription-type vial from the bag, and said, "I do have a little bit of speed but that is all I have." Mathewson, who recognized that some of the contents of the vial were controlled substances, asked if the drugs had been prescribed by a physician. Defendant smiled and replied, "I just picked them up." Because defendant revealed this information almost as soon as they reached the office, Mathewson had not advised him of his right to refuse to be searched or his right to consult with an attorney. After examining the contents of the vial, Mathewson searched the totebag, finding a brown

paper bag containing a quantity of white powder substance wrapped in a clear plastic bag. Defendant identified this substance as mannite, a substance Mathewson knew was commonly used as a cutting agent for narcotics. Mathewson also found a variety of items of drug paraphernalia. Mathewson then conducted a pat down search, and he felt what he suspected to be concealed drugs. Mathewson then placed defendant under arrest and continued the search. A plastic bag of suspected cocaine was found on defendant's person. Defendant was then taken to the DEA airport office where he was processed and thorough searches of his person and bag were conducted. In the bag Mathewson found a Johnson's Baby Powder container, in which was concealed a second quantity of suspected cocaine.

Defendant filed a motion to suppress evidence of the contraband, contending that the initial stop was illegal. Defendant further urged that, even if the initial stop was legal, the later seizure was violative of the Fourth Amendment because it was not based on probable cause. After a hearing, the magistrate concluded that the initial stop was constitutionally valid and that defendant had consented to be searched. The magistrate further reasoned, once defendant voluntarily revealed that he was carrying controlled substances in the prescription vial, Agent Mathewson had probable cause to arrest defendant and therefore any search incident to that arrest was legal. Indicating that it was troubled over the issue of consent, the district court heard additional testimony. At the conclusion of the testimony, the district court opined that defendant consented to the search and thus the evidence was admissible. On appeal, defendant adheres to his position that both the initial stop and the later seizure

were illegal.

[1, 2] We find no merit to the argument that the initial stop of defendant by Agent Mathewson was illegal, for the record is clear that defendant was not, at that point, restricted in any way. He was free to talk with Mathewson or, if he wished, to walk away. So long as a citizen is not restrained in any way or so long as his or her cooperation is not obtained by coercion, force, or other use of authority, a mere police-citizen contact is generally not within the protections of the Fourth Amendment. *United States v. Berd*, 634 F.2d 979 (5th Cir. 1981); *United States v. Pulvano*, 629 F.2d 1151 (5th Cir. 1980); *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979), *cert. denied*, 447 U.S. 910, 100 S.Ct. 2998, 64 L.Ed.2d 861 (1980). Thus, neither probable cause nor reasonable suspicion is required to justify the stop.

[3, 4] We similarly have no trouble disposing of defendant's argument that the seizure was illegal. Although the conclusion to be drawn from the evidence is disputed, the record amply supports the district court's conclusion that defendant voluntarily consented to be searched. Without undue or illegal compulsion on the part of Agent Mathewson, defendant agreed to accompany Mathewson to the Delta office for a pat-down search. Before the pat-down could commence, defendant voluntarily produced the vial containing controlled substances. We observe that even in the absence of consent, this admitted possession of controlled substances gave rise to probable cause to search defendant's body and his totebag. *United States v. Herbst*, 641 F.2d 1161, 1167-68 (5th Cir., April 8, 1981). In the alternative, the production of the controlled substances gave rise to probable cause to arrest defendant for possession of controlled substances; once probable cause to

arrest was established, any search of the person incident to the arrest was valid. *United States v. Herbst, supra,* 641 F.2d 1161 (5th Cir., April 8, 1981); *United States v. Pulvano,* 629 F.2d 1151 (5th Cir. 1980).

The motion to suppress was properly denied.

We AFFIRM.

APPENDIX B

[U.S. Court of Appeals, Filed June 8, 1981,
Gilbert F. Ganucheau, Clerk.]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

NO. 80-7797

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
PAUL EDWARD MOELLER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING

Before RONEY, FRANK M. JOHNSON and HENDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed

in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ FRANK M. JOHNSON JR.
United States Circuit Judge

CLERK'S NOTE:

SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

APPENDIX C

[Filed in Clerk's Office, U.S.D.C. – Atlanta, July 24, 1980, Ben H. Carter, Clerk; By: /s/P. Montgomery.]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

UNITED STATES OF AMERICA	CRIMINAL
vs.	INDICTMENT
PAUL EDWARD MOELLER	80-128A

MAGISTRATE'S REPORT, RECOMMENDATION AND ORDER

On May 21, 1980 a federal grand jury sitting in the United States Courthouse in Atlanta, Georgia returned a one-count indictment against the above-named defendant, charging him with unlawfully and knowingly possessing with the intent to distribute a Schedule II controlled substance, cocaine, in violation of 21 U.S.C. § 841(a)(1).

On June 9, 1980 the defendant filed a Motion to Suppress evidence which was allegedly illegally seized from him pursuant to an investigatory stop conducted at the Atlanta Hartsfield International Airport. This court conducted an evidentiary hearing to inquire into this motion on June 16, 1980. The transcripts of said hearing have now been received, enabling this court to make the following "Findings of Fact" and "Conclusions of Law."

FINDINGS OF FACT

1. On May 8, 1980 at approximately 8:55 a.m., Special Agent Terry Matheson of the Drug Enforcement Administration was on duty at the Atlanta Airport observing passengers at Gate 67, Delta Concourse F, which was the

arrival gate of Delta Flight 412, a non-stop flight from West Palm Beach, Florida.[1] (Tr. 4).

2. At approximately 8:55-9:00 a.m., Agent Matheson first observed the defendant, Paul Edward Moeller, deplane from the above-mentioned flight. (Tr. 6).

3. Matheson observed Moeller approach and speak with a Delta gate agent, who was giving connecting flight information. Moeller removed his ticket from his ticket envelope and asked the agent for directions to Delta Flight 530 bound for Indianapolis, Indiana. Matheson, who was standing to the right of the gate agent, saw that Moeller's ticket was paid for in cash and that there was no baggage claim check stubs attached to the ticket envelope. Matheson also noticed that Moeller was carrying one small tote bag.[2] The gate agent advised Moeller that his connecting flight to Indianapolis departed from Gate 59. At that point, Moeller turned away from the gate agent and walked up Concourse F toward Gate 59. (Tr. 6-7).

4. Matheson maintained surveillance of Moeller as the latter proceeded up Concourse F. Matheson saw Moeller enter a restroom across from Gate 64. Matheson then proceeded to Gate 59, where he spoke with the Delta agent checking in passengers for Flight 530 to Indianapolis. Matheson gave a detailed description of Moeller to the agent, and asked the agent to set aside Moeller's ticket when it was in fact presented, and to verify that there were no baggage claim checks attached to Moeller's ticket envelope. (Tr. 8-9).

---

[1] Matheson testified that flights arriving from South Florida were routinely surveilled since that area is known as a primary distribution area for cocaine (Tr. 4-5).

[2] It was apparent to Matheson that the bag contained little contents since it appeared "collapsed inward" (Tr. 7).

5. Matheson proceeded back to the area where Moeller entered the restroom, and observed the defendant talking on a public telephone near Gate 61. After a conversation lasting about ten minutes,[3] Moeller left the phone area and proceeded to Gate 59. (Tr. 8-9).

6. After reaching Gate 59, Moeller checked in with the Delta agent for the flight to Indianapolis. After checking in, Moeller went behind the Delta counter to the passenger seating area and sat down near other passengers who were waiting to board various flights. Matheson examined Moeller's ticket coupon, which was set aside by the Delta agent. Matheson noted that the ticket was issued in the name "Paul Moeller," was paid for in cash, and was a one-way ticket from West Palm Beach, Florida to Indianapolis, Indiana via Atlanta, Georgia. The Delta agent verified that no baggage claim checks were attached to Moeller's envelope. (Tr. 9-10).

7. Immediately after obtaining this information, Matheson proceeded to the Delta "reservation computer" to check the reservation history for "Paul Moeller." The computer verified the information on the ticket and, in addition, indicated that the reservation had been made on May 8, 1980 at 3:56 a.m. (some three hours prior to departure) and that no local telephone contact had been given in West Palm Beach (Tr. 10-11).

8. After retrieving Moeller's reservation history, Matheson returned to Gate 59 and observed the defendant still seated in the passenger waiting area. Matheson approached Moeller, leaned over, and whispered in Moeller's

---

[3] Moeller later testified that he called his wife to inform her of his pending arrival in Indianapolis (Tr. 55). Matheson also agreed that this call's duration was longer than that associated with the typical drug courier's call. See *United States v. Elmore*, *infra*, at 1039.

ear that he was a police officer and asked Moeller if the defendant would step outside to talk with him.[4] Moeller got up and accompanied Matheson over to the side of the waiting area. Matheson again identified himself as a police officer, displayed his credentials, and asked if he could speak with Moeller, who agreed thereto (Tr. 13-15).

9. Matheson asked Moeller if he could see the defendant's airline ticket. Moeller handed Matheson his ticket, which was issued in the name of "Paul Moeller." Matheson asked the defendant if his name was "Paul Moeller," and the defendant replied that it was. Matheson asked Moeller if he had any identification, and Moeller handed Matheson an Indiana driver's license [5] which was issued in his name and had his photograph. At this time Matheson noticed that Moeller appeared very nervous (his hands were in fact trembling), but the defendant expressed no objections to complying with Matheson's requests (Tr. 15-16).

10. After looking at Moeller's driver's license, Matheson asked the defendant what the purpose of his trip to West Palm Beach was. Moeller stated that he went there to visit relatives and stayed for one week. Moeller also told Matheson that the tote bag was the only piece of luggage he was carrying and that he used his cousin's clothing while in West Palm Beach. This total conversa-

---

[4] Matheson testified he "whispered" into Moeller's ear requesting that Moeller accompany him outside the seating area so as not to embarrass the defendant, since there were "hundreds" of people in the Gate 59 seating area waiting to board verious flights (Tr. 13-14, 42).

[5] Matheson first testified that Moeller showed him an Ohio driver's license, but later identified Moeller's Indiana driver's license as the one he probably saw (Tr. 46-47). The defendant testified he has never been licensed to drive in Ohio (Tr. 60).

tion between Moeller and Matheson lasted about 2-3 minutes (Tr. 17).

11. Matheson then advised Moeller that he was a federal narcotics agent looking for drugs coming into the airport; and asked Moeller if he (Moeller) was carrying any drugs. Moeller asserted that he was not. Matheson then asked the defendant if he would consent to a brief search of his person and tote bag. Moeller then stated, "I'm not sure—what do you want to do?" Matheson then explained that he wanted to "pat him down" and look in Moeller's tote bag. After expressing concern about missing his flight to Indianapolis, and being assured by Matheson that the search would only take five minutes and that Moeller's flight did not depart until 30 minutes later, Moeller consented to the search. Matheson asked the defendant whether Moeller preferred to have the search conducted outside the Gate 59 waiting area (where they were standing) or in an adjacent private room. Moeller indicated he would prefer to be searched in the adjacent room. The two then proceeded to the nearby Delta office (which was about 75-100 feet away).[7] (Tr. 18-20).

12. Matheson and Moeller entered the office and Moeller put his tote bag on a desk. Before Matheson was able to advise the defendant of his right to refuse consent to search as per normal DEA practice (i.e., to read to Moeller the standard warnings from a card Matheson uses to advise suspects of their right to refuse consent) Moeller reached into his pocket, removed a small brown

---

[7] At no time either before or during the walk to the Delta office did Matheson have any physical contact with Moeller. During the walk to the Delta office, Moeller maintained possession of his ticket, driver's license, and tote bag (Moeller's testimony to the contrary being deemed unworthy of belief.)

plastic prescription vial, open it, and showed Matheson its contents, stating simultaneously therewith that he was only carrying a little "speed" (i.e., the street term for methamphetamine, a controlled substance). Matheson recognized the contents to be several different kinds of controlled substances, notwithstanding defendant's assertions. Matheson asked if Moeller had been prescribed such drugs by a physician or just "picked them up somewhere?" Moeller smiled and replied, "I just picked them up." (Tr. 21-24).

13. After setting the prescription vial on a table, Matheson conducted a quick search of the tote bag. The agent found a brown paper bag in the inside pocket of the tote, which contained a clear plastic bag consisting of a white powdery substance. Moeller told Matheson, "That stuff is just Manite I picked up for a friend." Matheson knew Manite was a substance regularly used to cut illegal drugs. Matheson also observed another glass vial, and other drug paraphernalia.[8] (Tr. 24-25).

14. Matheson then conducted a "pat down" search of Moeller's person. Upon reaching the defendant's crotch area, Matheson felt a hard substance which felt and "crinkled" like a plastic bag. Matheson then placed Moeller under arrest, handcuffed Moeller, reached into Moeller's pants and pulled out the plastic bag of suspected cocaine (Tr. 25-26).

15. After the arrest, Moeller was transported by Matheson and an Atlanta police officer to the DEA Office. A more thorough search of the tote bag was conducted by Matheson and revealed a Johnson's Baby Powder con-

---

[8] Moeller testified that he did not remove the prescription vial from his pocket until Matheson found the Manite (Tr. 61-62). Again, this court deems this testimony not credible.

tainer with a white, powdery substance of suspected cocaine concealed within the baby powder. Other items found in the tote bag included approximately $1,000 in cash and a Vick's inhaler with its interior removed.[9] A piece of yellow lined paper with notations of four names and amounts of money was also found in Moeller's pocket or wallet (Tr. 26-27).

CONCLUSIONS OF LAW

1. The Motion to Suppress should be denied.

A. The approach and stop of the defendant were constitutionally valid.

Police officers may approach citizens for the purpose of investigating possible criminal behavior even though sufficient probable cause to arrest is lacking. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1866, 20 L. Ed. 2d 889 (1969). The *Terry* rationale has been further expanded and refined to permit a brief investigatory stop to investigate suspicious behavior, but requires that the officer conducting the stop point to some specific, articulable fact to warrant the suspicion. *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975).

However, a police officer may constitutionally attempt to "interview" a citizen without having either probable cause or reasonable suspicion; and a person so confronted is not arrested or "seized" within the meaning of the Fourth Amendment if he is free to choose whether to enter or continue an encounter with police and elects to do so. *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979), *cert. denied*, ____ U.S. ____, 48 U.S. L.W. 3803

---

[9] Matheson testified that such a converted inhaler is another type of "drug paraphernalia" used to transport illegal drugs (Tr. 27).

(No. 78-6884, June 10, 1980); *United States v. Brunson*, 549 F.2d 348 (5th Cir. 1977).

> As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification. *United States v. Mendenhall*, ____ U.S. ____, 48 U.S. L.W. 4575, 4578 (No. 78-1821, May 27, 1980).

Applying the aforementioned standards to the facts of the instant case, this court concludes that the initial approach of the defendant by Agent Matheson amounted to no more than an authorized "contact." Matheson approached Moeller, identified himself, and asked whether or not he could talk with him. Matheson did not threaten, force, or coerce Moeller into talking with him, nor did he imply at the time that Moeller's freedom of movement was being impeded.

> The initial encounter was not precipitated by force. There was no physical contact. The only show of authority occurred when the [agent] initially approached [defendant] and identified [himself] as [a] federal law enforcement [officer]. Such identification is insufficient to convert an encounter, otherwise regarded as outside the purview of the Fourth Amendment, into *Terry* stop. *Elmore*, *supra* at 1042.

By seeking Moeller's permission to speak with him, Matheson suggested, at least by implication, that he was free to leave, if he so desired.

When Matheson first approached the defendant, it was known that: (1) the defendant had just deplaned from a flight from a "source" area for cocaine; (2) the defendant was carrying little luggage; (3) the defendant's ticket had been bought with cash for his one-way trip shortly before

departure; (4) no local telephone contact was given when the reservations were made; and (5) the defendant had made a phone call shortly after arriving. During the course of his interview of Moeller, Matheson also learned that: (6) the defendant alleged that he had visited relatives for one week in Florida, although he was only carrying a small tote bag (Moeller claimed he wore his cousin's clothes while in Florida), and (7) the defendant appeared nervous. Thus, once Matheson "asked" the defendant for his consent to be searched and accompanied the defendant to the adjacent Delta office, it is arguable that a full investigatory stop based on "specific articulable facts" occurred.[10] See *Mendenhall, supra*, at 4580-4581.[11]

---

[10] Defendant's contention that he was in fact "seized" when he voluntarily gave Matheson his airline ticket and driver's license is unsupported. In *Elmore, supra*, the court concluded a "seizure" of the defendant occurred when the agent took the defendant's ticket from Elmore's immediate vicinity to a Delta check-out counter. However, in the instant case, Matheson never removed Moeller's ticket or driver's license from the area in which the "interview" took place, and, as previously mentioned, Moeller retained possession of his ticket and driver's license when he walked to the Delta office.

[11] In an amendment to his Motion to Suppress filed July 22, 1980, the defendant asserts that the Supreme Court's recent decision in *Reid v. Georgia*, ___ U.S. ___, 27 Crim. L. Rptr. 4123 (June 30, 1980) supports his position that Matheson's "seizure" of defendant was unconstitutional. In *Reid, supra*, the defendant was approached by a DEA agent after leaving an airport terminal building with another passenger. Prior to his approach, the DEA agent observed that Reid arrived from a "source" city for cocaine, arrived in the early morning, carried no luggage other than a shoulder bag, and tried to disassociate himself from his companion. The Georgia Court of Appeals, assuming that the stop for identification questioning constituted a "seizure," held that the agent's actions were justified by reasonable and articulable suspicion. The Supreme Court vacated this decision, and remanded the case back to the Georgia Court of Appeals, holding that "the judgment of the appellate court cannot be sustained insofar as it rests on the determination that the DEA agent lawfully seized the [defendant] when he approached him outside the airline terminal." While the Court found that the agent could not, as

B. **The defendant's consent to the search of his person and tote bag was constitutionally valid.**

Notwithstanding this court's characterization of the events preceding the search of the defendant, the search which was conducted was lawful if conducted pursuant to the defendant's free and voluntary consent, as determined from the circumstances surrounding the case. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 204, 36 L. Ed. 2d 854 (1972); *Mendenhall, supra* at 4579. The fact that a person may be in police custody does not automatically mandate a finding that consent was involuntary. *United States v. Smith*, 543 F. 2d 1141 (5th Cir. 1976), *cert. denied*, 429 U.S. 1110 (1977). In addition, although "proof of knowledge of a right to refuse" consent is "highly relevant" to the determination of whether consent has been given, *Mendenhall, supra* at 4579, *Miranda*-type warnings are not absolutely required to validate a consent search where no official coercion is found. *United States v. Garcia*, 496 F.2d 670 (5th Cir. 1974), *cert. denied*, 420 U.S. 960 (1975); *United States v. Hall*, 565 F.2d 917 (5th Cir. 1978).

In the instant case, Matheson asked the defendant if the defendant was carrying any drugs. After Moeller

---

a matter of law, have reasonably suspected Reid of criminal activity on the basis of the above-mentioned circumstances, it did *not* rule that a "seizure" in fact took place. See Powell, J. concurring. The *Reid* Court remanded the case to the Georgia appellate court for a consideration of whether, in its opinion, the defendant had actually been "seized" at the time he was approached and questioned by the DEA agent. The *Reid* case, therefore, does not support defendant's contention since (1) Moeller was not "seized" when initially approached by Agent Matheson, and (2) assuming *arguendo* that an illegal "seizure" eventually occurred, the defendant subsequently consented to the search of his person and tote bag (see Section B, *infra*.)

replied in the negative, Matheson asked Moeller if he would consent to a search of his person and tote bag. When Moeller asked Matheson what such a search would entail, Matheson carefully explained that he wanted to "pat down" Moeller and look inside Moeller's tote bag, to which Moeller readily agreed, and elected to have the search conducted in the nearby Delta office.[12] Although Matheson intended to advise Moeller of his right to refuse consent once they entered the Delta office, as Matheson started to do so Moeller voluntarily handed over a prescription vial from his pocket and showed its contents to the agent.

Thus, the conversations between the defendant and Agent Matheson were devoid of any hint of coercion or intimidation in seeking to obtain consent. Hence, even assuming *arguendo* that the defendant had been illegally stopped, or arrested, his subsequent voluntary consent to be searched would have vitiated the taint of any prior illegality, thus making the discovery of the contraband lawful, as a product of a consensual search. See *United States v. Troutman*, 590 F.2d 604 (5th Cir. 1979); *United States v. Berry*, CR 79-22A (N.D. Ga. May 14, 1979, Henderson, J.).

Having voluntarily consented to a search of his person, none of defendant's Fourth Amendment rights were violated.

---

[12] Although Moeller expressed concern about missing his flight, he was assured by Matheson that the search would only take five minutes. See *Mendenhall, supra* at 4579.

C. Matheson had probable cause to arrest the defendant after defendant voluntarily handed over the prescription vial containing illegally obtained controlled substances, and could have searched the defendant and the tote bag incident to that arrest.

Probable cause to make an arrest is formulated "when reasonably trustworthy facts and circumstances are within the knowledge of the arresting officer to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *United States v. Agostino*, 608 F.2d 1035, 1037 (5th Cir. 1979); see also *United States v. Perkins*, 608 F.2d 1064 (5th Cir. 1979). When Moeller voluntarily removed the prescription vial from his pocket, opened the vial, and showed Matheson its contents (stating, "I do have a little speed"), Matheson had probable cause to arrest the defendant. Thus, even assuming *arguendo* that valid consent to search Moeller or his tote bag had not been obtained, Matheson was authorized in searching the defendant incident to his valid arrest for possession of a controlled substance. See *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); *Fixel v. Wainwright*, 492 F.2d 480 (5th Cir. 1974); *United States v. Jones*, 475 F.2d 723 (5th Cir. 1973).

RECOMMENDATION

Accordingly, for the reasons set forth above, it is hereby recommended that the defendant's Motion to Suppress be denied.

ORDER

Counsel for the parties having reported to the Magistrate that they have met regarding discovery and no motion for additional discovery will be filed; and this court having disposed of all pretrial motions filed; and

that there are no problems relating to the scheduling of the trial other than review of this court's Report and Recommendation, it is

ORDERED that this action be and the same is hereby declared ready for trial.

Let a copy of this Order by served by mail upon counsel for the parties.

AND IT IS SO ORDERED, this 24th day of July, 1980.

/s/ JOEL M. FELDMAN

JOEL M. FELDMAN

UNITED STATES MAGISTRATE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNIT B

U.S. COURT OF APPEALS RECEIVED
June 22, 1981, Atlanta, Ga.

NO. 80-7797

[U.S. Court of Appeals, Filed June 22, 1981, Gilbert F. Ganucheau, Clerk.]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PAUL EDWARD MOELLER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

---

ORDER:

( ) The motion of appellant for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of appellant for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including July 17, 1981 the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari

petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of_____ for a further stay of the issuance of the mandate is DENIED.

/s/ FRANK M. JOHNSON, JR.
UNITED STATES CIRCUIT JUDGE

Office - Supreme Court, U.S.
FILED
NOV 16 1981
ALEXANDER L. STEVAS
CLERK

No. 81-87

In the Supreme Court of the United States

OCTOBER TERM, 1981

PAUL EDWARD MOELLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Reid v. *Georgia*, No. 36953 (Ga. Sup. Ct. Apr. 9, 1981), cert. denied, No. 81-180 (Oct. 5, 1981) 5

Sibron v. *New York*, 392 U.S. 40 5

Terry v. *Ohio*, 392 U.S. 1 5

United States v. *Berry*, 636 F. 2d 1075, rehearing en banc granted June 16, 1981 5

United States v. *Elmore*, 595 F. 2d 1036, cert. denied, 447 U.S. 910 5

United States v. *Mendenhall*, 446 U.S. 544 .... 4, 5

United States v. *Patino*, 649 F. 2d 724 5

United States v. *Setzer*, 654 F. 2d 354 5

United States v. *Wylie*, 569 F. 2d 62, cert. denied, 435 U.S. 944 5

Constitution and statute:

United States Constitution, Fourth Amendment 1, 5

21 U.S.C. 841(a)(1) 1

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-87

PAUL EDWARD MOELLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his Fourth Amendment rights were violated in the course of an encounter with DEA agents at an airport.

After a jury-waived trial on stipulated facts in the United States District Court for the Northern District of Georgia, petitioner was convicted of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment, to be followed by a three-year special parole term and fined $10,000. The court of appeals affirmed (Pet. App. A; 644 F. 2d 518).

1. The evidence adduced at an evidentiary hearing before a magistrate showed that DEA Agent Matheson, who was routinely watching flights arriving at the Atlanta airport from South Florida, observed petitioner deplane from a nonstop flight from West Palm Beach, Florida (Pet. App. 1c-2c). Petitioner was carrying only a small tote bag that appeared to be nearly empty. When petitioner showed his

ticket to the gate agent and requested directions to his connecting flight, Agent Matheson noticed that no baggage claim stubs were attached to the ticket envelope (*id.* at 2c). At Agent Matheson's request, the gate agent confirmed that no baggage claim stubs were attached to petitioner's ticket envelope and permitted Agent Matheson to examine the ticket. The ticket was for a one-way trip from West Palm Beach to Indianapolis, Indiana, via Atlanta, paid for in cash; a check of the airline reservation computer revealed that the reservation had been made at 3:56 a.m., three hours prior to departure of the flight, and that no local telephone contact number in West Palm Beach had been given (*id.* at 2c-3c).

Agent Matheson then approached petitioner while he was seated in a waiting area and, speaking in a low voice so as to avoid embarrassing petitioner, identified himself as a police officer and asked if petitioner would step outside the area and talk to him. Petitioner accompanied Agent Matheson to the fringe of the waiting area where Agent Matheson again identified himself as a police officer, displayed his credentials and asked if he could speak with petitioner, who agreed (Pet. App. 3c-4c). Agent Matheson asked petitioner for identification and to see his airline ticket. Petitioner, who appeared very nervous and whose hands were trembling, made no objection and handed the agent his ticket and his driver's license (*id.* at 4c). Agent Matheson asked about the purpose of the trip to West Palm Beach, and petitioner replied that he had visited relatives for a week; he added that the tote bag was his only luggage and that he had used his cousin's clothing while in Florida (*ibid.*).

At that point, Agent Matheson advised petitioner that he was a federal narcotics agent looking for drugs coming into the airport and asked petitioner if he was carrying any. When petitioner asserted that he was not, Agent Matheson asked if petitioner would consent to a brief search of his

person and tote bag. When petitioner said that he was not sure and asked what Agent Matheson wanted to do, the agent explained that the procedure would involve a pat down and a look in the bag. Petitioner then expressed concern about missing his flight, but Agent Matheson assured him that the search would take only five minutes, while petitioner's flight did not depart for 30 minutes. Petitioner then gave his consent and indicated, in response to Agent Matheson's inquiry, that he would prefer to be searched in a nearby private room rather than outside the public waiting area where they were standing. Petitioner maintained possession of his ticket, driver's license and tote bag as they walked to a nearby airline office (Pet. App. 5c).

As soon as they entered the office, before Matheson had an opportunity to advise petitioner of his right to refuse to consent to a search, in accordance with standard DEA practice, petitioner reached into his pocket and showed Matheson the contents of a small vial, stating that he was only carrying a little "speed" (Pet. App. 5c-6c). Petitioner admitted that the substance had not been prescribed by a physician. Agent Matheson recognized that the contents of the vial included several different kinds of controlled substances (*id.* at 6c). A quick search of the tote bag disclosed a plastic bag, which petitioner identified as "Manite I picked up for a friend." Agent Matheson knew that manite is a substance used to "cut" illegal drugs (*ibid.*). Agent Matheson then patted down petitioner's person and felt a hard substance that had the feel of a plastic bag. Petitioner was then placed under arrest and handcuffed. Agent Matheson then reached into petitioner's pants and removed a plastic bag that appeared to contain cocaine. A more thorough search of the tote bag was later conducted at the DEA office, which revealed more suspected cocaine concealed in a baby powder container, $1000 in cash, and an inhaler with its interior removed so that it could be used to transport

drugs; a lined yellow paper with notations of names and amounts of money was found in petitioner's pocket or wallet (*id.* at 6c-7c).

2. Petitioner's primary contention (Pet. 3-8) is that he did not consent to be searched. This contention is plainly insubstantial. The magistrate found the consent to be voluntary based on detailed findings of fact, concluding that "the conversations between [petitioner] and Agent Matheson were devoid of any hint of coercion or intimidation in seeking to obtain consent" (Pet. App. 11c). The district court also found that the consent was voluntary (*id.* at 6a), and the court of appeals held that the record "amply supports" this conclusion (*id.* at 7a). Petitioner advances no reason to disturb this factual conclusion of the courts below. Contrary to petitioner's contention (Pet. 5), the fact that he actually was carrying contraband does not render the search involuntary. See *United States* v. *Mendenhall*, 446 U.S. 544, 559 & n.7 (1980). And petitioner's statement before he consented that he was concerned about missing his flight (Pet. 4) meant nothing more than that he was concerned about missing his flight; it does not vitiate the subsequent consent. See *United States* v. *Mendenhall*, *supra*, 446 U.S. at 559. Indeed, the first contraband found by the agents was not the result of a search at all, but rather was voluntarily turned over by petitioner before the search took place. See Pet. App. 7a-8a.

3. Petitioner also contends (Pet. 8-10) that he was illegally seized when Agent Matheson first approached him in the waiting area and requested his identification. Both the magistrate (Pet. App. 7c-8c) and the court of appeals (*id.* at 7a) correctly concluded, however, that the approach by Agent Matheson was not a seizure within the meaning of the Fourth Amendment.

This Court has recognized that not every contact between a citizen and a police officer constitutes a seizure within the

meaning of the Fourth Amendment simply because a policeman can reasonably expect a citizen to stop when a question is posed to him. As explained in *United States* v. *Mendenhall, supra*, 446 U.S. at 553 (opinion of Stewart, J.), "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." See also *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968); *Sibron* v. *New York*, 392 U.S. 40, 63 (1968).

The courts of appeals generally have agreed with Justices Stewart and Rehnquist (see *United States* v. *Mendenhall, supra*, 446 U.S. at 551-557) that a contact such as that in this case does not constitute a seizure. See *United States* v. *Setzer*, 654 F. 2d 354 (5th Cir. 1981); *United States* v. *Berry*, 636 F. 2d 1075 (5th Cir. 1981), rehearing en banc granted June 16, 1981; *United States* v. *Elmore*, 595 F. 2d 1036 (5th Cir. 1979), cert. denied, 447 U.S. 910 (1980); *United States* v. *Wylie*, 569 F. 2d 62, 66-68 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978). See also *Reid* v. *Georgia*, No. 36953 (Ga. Sup. Ct. Apr. 9, 1981), cert. denied, No. 81-180 (Oct. 5, 1981).[1] Petitioner points to no circumstances of his case that indicate any use of force or

---

[1] In *United States* v. *Patino*, 649 F. 2d 724 (1981), the Ninth Circuit held an airport contact by a DEA agent to be a seizure, although it expressly recognized the principle that not all citizen-police contacts are seizures. *Patino* clearly does not conflict with the instant case. First, the *Patino* court relied (in our view incorrectly) on certain factors not present here. See 649 F. 2d at 727. Moreover, *Patino* affirmed a ruling by the district court, and the court expressly distinguished other cases, such as this one, where the defendant appealed from an adverse ruling of the district court. 649 F. 2d at 728-729 & n.4.

restraint on his movement so as to warrant a different result here, and the magistrate explicitly found that there were none.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1981

---

[2]In addition, the magistrate noted that Agent Matheson arguably had reasonable suspicion sufficient to "stop" petitioner when he asked petitioner for his ticket (Pet. App. 9c). He also found that, assuming arguendo that petitioner had been illegally detained, his consent was sufficiently an act of his free will to vitiate the taint of the illegality (*id.* at 11c).

DOJ-1981-11